

[\*Fields v. Florida Power Corp.\*](#), 96-ERA-22 (ARB Mar. 13, 1998)

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**U.S. Department of Labor**  
Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**ARB CASE NO. 97-070**  
**ALJ CASE NO. 96-ERA-22**  
**DATE: March 13, 1998**

In the Matter of:

**DAVID A. FIELDS, ROBERT P. WEISS,**  
**and JACK D. STEWART,**  
**COMPLAINANTS,**

**v.**

**FLORIDA POWER CORPORATION,**  
**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This case arises under Section 211, the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), codified at 42 U.S.C. §5851 (1988 and Supp. V 1993).<sup>1</sup> David A. Fields (Fields) and Robert P. Weiss (Weiss) alleged that Florida Power Corporation (FPC or Florida Power) violated the ERA when it discharged them from employment. Jack D. Stewart (Stewart) alleges that his demotion violated the ERA.<sup>2</sup>

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In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) granted FPC's motion for summary decision, which was based upon subsection (g) of Section 211 (Section 211(g)), on the ground that Complainants deliberately caused a violation of the ERA and were not entitled to its protection for whistleblowers.<sup>3</sup> The ALJ articulated a three part test for establishing a Section 211(g) defense and applied it to the

facts of this case. We modify the ALJ's statement of the "test" to be applied to a Section 211(g) defense, find that FPC has established the defense in this case, and dismiss the complaint.

## **BACKGROUND<sup>4</sup>**

Fields was a Nuclear Shift Supervisor at the Crystal River 3 nuclear plant (CR-3) in Florida, which FPC operates. Complaint at p.1 (C. at 1).<sup>5</sup> Weiss was an Assistant Shift Supervisor and Stewart was one of two Chief Nuclear Operators under Fields's direction. The three Complainants, who held reactor operator licenses issued by the Nuclear Regulatory Commission (NRC), worked together as control room operators on the "A Shift" at CR-3. C. at 2.

One of the responsibilities of control room operators is to monitor the level of hydrogen pressure in a storage vessel called the Makeup Tank (MUT), which is part of the makeup system at the plant. C. at 4. The makeup system is designed to maintain water levels in the reactor coolant system and is one of the primary safety systems in the event of a loss of coolant accident. C. at 4-5.

Prior to April 1993, the hydrogen pressure in the MUT was maintained below a limit of 12 psig. C at 6 and CX 6.<sup>6</sup> That month, FPC issued a new calculation, called Curve 8, that varied the amount of hydrogen pressure according to the amount of water in the MUT. Under the new Curve 8, the more water there was in the MUT, the higher the amount of hydrogen pressure allowed. C at 6-7 and CX 2. FPC management instructed control room operators to maintain the hydrogen pressure in the MUT at the maximum level allowed by the new Curve 8. C. at 8.

FPC considered Curve 8 to be a conservative "operating curve" because it supposedly included a margin of error and was presumed to be well within the "design basis" requirements of a nuclear power plant. C. at 7. Merely exceeding an operational curve is not a violation of a nuclear safety requirement. In contrast, when a design basis is exceeded, the company must correct the problem immediately, report the event within one hour to the NRC, and issue a Licensee Event Report within 30 days. C. at 8.

Complainants were concerned that maintaining hydrogen pressure in accordance with Curve 8 was unsafe and notified the Engineering Department and the Manager of Nuclear Operations, Greg Halnon. C. at 9. Complainants were not satisfied with the Department's assurance that maintaining pressure according to Curve 8 was safe. *Id.*

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On May 10, 1994, during the performance of a scheduled test procedure ordered by management, the A shift operators plotted the MUT's actual tank response and pressure levels when draining the tank and noted that pressure levels were tending towards the unacceptable region in Curve 8. C. at 10. Complainants' coworker, Mark VanSicklen,

prepared a Problem Report informing managers about the concern with Curve 8 and included the actual data obtained during the test. C. at 10 and CX 3.

FPC managers continued to direct CR-3 operators to maintain the maximum hydrogen pressure allowed under Curve 8. C. at 11; CX 4, 5. The A Shift operators continued to raise concerns about Curve 8 with their managers to no effect. C. at 13. VanSicklen raised the issue with the NRC resident inspector, who suggested that if Complainants did not like management's response, they should submit a formal allegation to the NRC. C. at 15.

On September 2, 1994, Operations Support Manager Carl Bergstrom showed Fields a draft memorandum from Engineering stating that Curve 8 was accurate, "reasonably conservative," and safe, and that the issue would be closed. C. at 15 and CX 9. A handwritten notation on the memorandum indicated that it was a "draft recommendation" and that Fields should review it and provide comments to his immediate supervisor, Halnon. CX 9.

The A Shift operators discussed an appropriate response to the draft letter closing out the Problem Report on Curve 8. C. at 16. They decided to conduct an operational "evolution," not required by plant conditions, to obtain data that would show whether their concerns about Curve 8 were valid. No one consulted the Engineering Department, FPC managers, or the NRC concerning the plan. Complainants believed that the planned evolution comported with existing procedures and was within their authority to perform. C. at 16-17.

The operators added hydrogen to the MUT when it was at the maximum water level. C. at 20. Their actions triggered a control room annunciator alarm light ("Makeup Tank Pressure High"), indicating that the tank pressure was too high for the level of water. C. at 18. Complainants kept the hydrogen pressure constant while they rapidly reduced the water level. Therefore, the alarm light continued to be triggered for 43 minutes.<sup>7</sup>

The data gathered during the September 4 evolution was inconclusive and Complainants decided to try the evolution again the next night. C. at 20-23. Again, Complainants did not notify managers or the NRC of their intent to perform an unscheduled evolution.

On September 5 the Complainants told the auxiliary building operator to "dress out," or wear protective clothing that would allow him quickly to vent hydrogen from the MUT should a loss of coolant accident occur during the evolution. C. at 23. The Complainants again added hydrogen to the MUT when it was at its upper limit of water. This time they waited 30 minutes before reducing the water level and the annunciator alarm light was triggered

after the water reduction began. *Id.* The alarm was triggered for 35 to 37 minutes during the September 5 evolution. *Compare* C. at 23 and R. D. and O. at 4, ¶9.

At the time of the evolutions, although Complainants suspected that Curve 8 was nonconservative, they did not know that it was a design basis that should never be exceeded. C. at 7, 27. The data from the September 5 evolution showed that the actual system response exceeded the limits of Curve 8 and eventually led to the Engineering Department's acknowledgment that the curve was a design basis curve. C. at 26-28.

Complainants prepared a Problem Report following the September 5 evolution. C. at 24; CX 14. The Problem Report did not mention the September 4 evolution, C. at 25-26, although Weiss did voluntarily inform a superior, Senior Licensing Engineer Paul Fleming, about it. C. at 26. Fields and Weiss did not include the first evolution in a written chronology of events, C. Ex. 18, or mention it in numerous meetings with FPC managers and attorneys. C. at 40; Fields Dep. at 257. In response to the September 5 incident, FPC took the A Shift operators "off shift," which meant that they no longer operated a reactor. C. at 34. Fields was reassigned to the position of support shift supervisor, an administrative position. C. at 38. Weiss was transferred to another position as well. *Id.*

In response to FPC's notification of the September 5 evolution, the NRC's Office of Investigations (NRC-OI) instituted an investigation. Complainants did not tell NRC-OI staff about the earlier evolution.<sup>8</sup> RX 53, 54, 55.

FPC allowed Fields to review a draft letter to the NRC explaining the September 5 evolution. C. at 41. Fields and Weiss disagreed strongly with the tenor of the letter, which completely blamed them for the two unauthorized evolutions, and Fields told managers that he would write his own letter to the NRC. *Id.*; *see also* CX 34 (FPC letter to NRC) and CX 35 (Fields letter to NRC).

When an FPC manager told Fields there were rumors of a second unauthorized evolution, Fields informed management in July 1995 for the first time about the September 4 evolution. C. at 47. FPC immediately placed the Complainants on administrative leave. C. at 49. The company discharged Fields and Weiss "for violation of procedures and failure to disclose the full intent, details, and existence of the September 4, 1994 test for nearly 11 months following occurrence." C. at 50 and CX 45. For his role in the unauthorized evolutions, Stewart was transferred to a position outside of operations and received a written reprimand. *Id.*

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In its report, the NRC-OI report found that:

the shift supervisor, assistant shift supervisor, and two chief operators on the midnight shift of September 4 and 5, 1994, deliberately conducted an evolution,

not required by plant conditions, for the specific purpose of gathering data. Furthermore, when the allowable makeup tank over pressure was exceeded, the operators deliberately delayed taking appropriate action to reduce makeup tank over pressure while gathering that data.

RX 64, Synopsis, at 1.

A later NRC Notice of Violation and Imposition of Civil Penalties states that FPC committed several violations of NRC requirements, including routinely exceeding Curve 8, which actually was a design basis curve. RX 58 at 2. The NRC also found that Complainants' two unauthorized tests violated its regulations. RX 58, Enclosure 1 at 2.<sup>9</sup> The NRC acknowledged that Complainants conducted the evolutions to resolve safety issues that had not been addressed adequately by FPC. *Id.* The NRC also concluded that the September 4 and 5 violation "resulted from the independent actions of a single shift operating crew" but found that "FPC as the employer of the operators involved bears responsibility for their actions as employees." *Id.*

In letters to each Complainant, the NRC stated that the unauthorized evolutions constituted a violation of the conditions of an operator's license but determined not to take formal enforcement action against the Complainants. RX 61, 62. The agency noted that FPC already had revoked the Complainants' operator licenses. *Id.* Although the NRC recognized that Complainants contributed to something good -- the determination that Curve 8 was in error and nonconservative, and that the plant periodically had been operated outside its design basis -- the agency also chastised Complainants for not raising the issue with the NRC's Regional Office or Headquarters. *Id.*

### **THE ALJ'S RECOMMENDED DECISION**

Complainants filed complaints with the Department of Labor in February 1996 alleging that FPC disciplined all of them, demoted Stewart, and fired Fields and Weiss because they engaged in activities protected under the ERA. FPC moved for summary decision, citing Section 211(g). Complainants opposed the motion on the ground that they did not deliberately cause a violation since they did not know that the evolutions would cause a violation of the ERA.

The ALJ announced a three part test for establishing a Section 211(g) affirmative defense: (1) that the act was done without direction from the employer, (2) that complainants deliberately did an act, and (3) that the act caused a violation of ERA or AEA requirements. R. D. and O. at 16. The ALJ found that Complainants' actions satisfied the three part test and granted FPC's motion for summary decision.

The standard for granting summary decision in whistleblower cases, 29 C.F.R. §18.40 and 18.41, is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e): moving parties must show that there is no material issue of fact and that they are entitled to prevail as a matter of law. *Freels v. Lockheed Martin Energy Systems, Inc.*, Case Nos. 94-ERA-6 and 95-CAA-2, Final Dec. and Order, Dec. 4, 1996, slip op. at 5 and cases there cited, *appeal dismissed sub nom. Freels v. Secretary of Labor*, Nos. 97-3117 & 97-3383 (6th Cir. Dec. 31, 1997). The facts are considered in the light most favorable to the party opposing the motion for summary decision. *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec. Dec. and Rem. Ord., July 17, 1995, slip op. at 5. An opposing party "may not rest upon mere allegations or denials [in the] pleading[s], but must set forth specific facts showing that there is a genuine issue for trial" and "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986).

To determine if summary decision is warranted, we will examine the showing required of FPC under Section 211(g), beginning with a determination whether Complainants acted without direction from their employer.

#### **Complainants Acted Without Direction from FPC**

It is undisputed that FPC did not expressly direct Complainants to conduct the evolutions on September 4 and 5, but that does not end the inquiry. Complainants argue that an employee acting under the "implied authority" of the employer has acted with the employer's direction. *See* Comp. Br. at 26.

In *Dotson v. Anderson Heating and Cooling, Inc.*, Case No. 95-CAA-11, ALJ Rec. Dec. and Ord., Oct. 2, 1995, *adopted in* ARB Fin. Dec. and Ord., July 17, 1996, which arose under the Clean Air Act's (CAA) analogous employee protection provision,<sup>10</sup> Environmental Protection Agency (EPA) regulations promulgated under the CAA required workers in the heating and cooling trade to pass a certification test on refrigeration. After failing the test the first time, the complainant, Dotson, participated with his coworkers in cheating during the second administration of the test. The ALJ stated:

There is no evidence in the record to support a conclusion that [Dotson's employer] Anderson explicitly ordered his employees to participate in the cheating activities which occurred during the October 31 examination. Therefore, *if there is to be a finding of direction by Anderson, it would have to be implied from the circumstances surrounding the testing.* (Emphasis added).

ALJ Rec. Dec. and Ord., slip op. at 19.

Complainants contend that there is a genuine issue of material fact concerning whether they conducted the evolutions under implied authority from FPC management. Comp. Br. at 26. As support for implied authority, Complainants initially cite statements of the NRC in letters declining formal enforcement action against them:

Performance of an unauthorized evolution affecting safety systems is a significant violation. However, after considering the results of the OI investigations, the various written submittals and affidavits you and your attorneys have presented, the information you provided during your predisciplinary enforcement conference, and Florida Power Corporation's (FPC) investigation results, *we have concluded that formal enforcement action against you is not warranted. This decision is based, in part, on the extent of FPC management's responsibility and culpability.* You are no doubt aware that the NRC has issued a significant sanction against FPC which included this violation. (Emphasis added).

RX 61 at 1-2 and RX 62 at 1-2. Complainants argue that "[i]f the management has been held responsible for this incident, then Complainants do not fall under the (g) exception, as they acted under the implied direction of their employer." Comp. Br. at 26.

We do not agree that the NRC's statements indicate the existence of implied authority in this case. In its letter to Fields, the NRC found that, "the unauthorized evolutions authorized and directed by you on September 4 and 5, 1994, constituted a violation of the conditions of your 10 CFR Part 55 license." RX 61 at 1<sup>11</sup>. After noting that the Complainants no longer possess an NRC operator's license (which FPC had revoked), the NRC stated that "[t]his experience should emphasize to you the importance of not taking unilateral action such as conducting unauthorized evolutions." *Id.* at 2. The NRC's use of the words "unilateral" and "unauthorized" in these circumstances to describe Complainants' actions negates any inference Complainants attempt to draw from the NRC letter quoted above that they had implied authority to conduct the evolutions. Furthermore, the NRC's Notice of Violation and Proposed Imposition of Civil Penalties faulted FPC for "*ineffective management oversight of engineering, operations, and corrective action activities demonstrated by these violations.*" Ex. 58 at 3 (emphasis added). Complainants worked in operations, one of the units that FPC did not oversee effectively. For all these reasons, we reject the argument that the NRC letters demonstrate implied authority.

Complainants also cite other factors to support their theory of implied authority in this case. They note that the CR-3 plant was "in an almost constant state of alarm for two months upon the initial issuance of Curve 8 and hundreds of times subsequently, without filing any reports with the NRC." Comp. Br. at 28, citing C. at 53. Complainants argue that the routine triggering of the MUT tank annunciator alarm light was a past course of

"management acquiescence and approval of similar conduct" which made it reasonable for them to believe that they had the authority to run the evolutions. Comp. Br. at 28.

The *Dotson* case is instructive concerning the allegation that management acquiescence constitutes implied authority. In that case, the employer, Anderson, was present in the room at the time that Dotson cheated on the examination. The ALJ reasoned, and we concurred:

Anderson was present in the room when Butch left the answer sheet. Although Complainant testified that he believed that Anderson had paid Butch a bribe to set up the exam and provide the answers, he presented no corroboration of this allegation. Therefore, there is no evidence that Anderson knew what Butch was about to do upon beginning the examination. But even if Anderson did know of Butch's plans, there must still be some additional showing that he exerted some pressure, even indirectly, upon his employees to both remain in the room and participate in the cheating. Complainant has offered no evidence to this effect, even by his own testimony. Thus, the question becomes: was Anderson's mere presence in that room significant enough to amount to "direction" to Complainant to cheat on the exam? While there is undoubtedly some combination of facts which would yield a positive answer to this question, this fact pattern does not. Complainant's willing participation in the reading aloud of the correct answers clearly separates him from being either an innocent bystander or the victim of Anderson's coercion, however slight. While it would be understandable for Complainant to be reluctant to refuse to take the exam under the circumstances which existed on October 31, clearly his willingness to take part in the reading of the answers strongly indicates his free will participation in the cheating. Based upon the foregoing, I find Complainant did not act at the direction of his employer during the test-taking incident of October 31, 1994.

*Dotson*, ALJ Rec. Dec. and Ord., slip op. at 19.

In *Dotson* the employer's physical presence during the complainant's commission of the unlawful act did not constitute implied authority. In this case FPC's prior acquiescence in operating the plant under conditions that triggered the MUT annunciator light likewise did not constitute implied authority. Moreover, FPC did not acquiesce in the precise behavior that caused a violation. Complainants conceded that no one had ever before raised the hydrogen pressure and the water to the maximum levels and rapidly drained the MUT of water, as they did. Fields Dep. at 59; Weiss Dep. at 179. We find no implied authority here on the basis of employer acquiescence in similar conduct.

Complainants' final argument concerning implied authority is based upon a duty under their operators' licenses to "protect the public and to assist in maintaining the plant at optimum safety levels." Comp. Br. at 28. They state that "[t]he only way

management would further consider their concerns was if they had some hard data to highlight the problem." Id. at 29. The NRC's letters to Complainants, however, explain that Complainants had at least two additional routes to raise their concerns about Curve 8:

We recognize that your operating crew had raised questions concerning the conservatism of operating curve OP-103B, Curve 8 to your management and to an NRC inspector. We are concerned about the responses received from both your management and the NRC. Nevertheless, as a Shift Supervisor, we would have expected you to have *raised your concern higher within FPC. You could have raised the issue to either the Regional office or NRC headquarters.* Rather than pursue other avenues, you authorized your crew to perform a test that was not described in the Final Safety Analysis Report by using a procedure that had not been designed for data gathering purposes. (Emphasis added).

RX 61 at 2 (Fields and Weiss letters); *see also* RX 62 at 2 (Stewart letter).

The record demonstrates unequivocally that Complainants could have brought their concerns about Curve 8 to higher managers within FPC and to the NRC's regional office and headquarters. Given that other avenues were available to pursue Complainants' safety concern, the duty to protect the public did not constitute implied authority to conduct the evolutions.

Taken alone or together, the three theories of implied authority did not generate a genuine issue of material fact. We find, as a matter of law, that Complainants acted without any implied authority and that they acted "without direction from" FPC when they caused a violation.<sup>12</sup>

### **Section 211(g) Contains an Element of Willfulness**

There is a considerable divergence of opinion among the parties and the Acting Assistant Secretary for Occupational Safety and Health, who filed a brief *amicus curiae*, concerning the meaning of the phrase, "deliberately causes a violation." Complainants contend that Section 211(g) must be interpreted "to require that a complainant know his acts are illegal before he is stripped of his whistleblower protection." Comp. Br. at 12. Complainants also argue that the NRC's definition of "deliberate" should apply to a Section 211(g) defense. Comp. Br. at 24-25. They state that under a NRC regulation, 50 C.F.R. §50.5(c), deliberate misconduct is defined as "an intentional act or omission that the person knows would result in a violation of law or regulation."<sup>13</sup> Id. at 24.

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Respondent argues the opposite, that Section 211(g) may deprive complainants of whistleblower protection even if they do not know that their act causes a violation. The ALJ agreed with Respondent and the three part test he derived does not contain a willfulness element.<sup>14</sup>

The Acting Assistant Secretary argues that Section 211(g) "applies only in situations where an employee willfully commits a nuclear safety violation," which would be satisfied either by knowledge that a violation will occur or by reckless disregard for whether a violation will occur. Asst. Sec. Br. at 4, 8. The Acting Assistant Secretary relies upon the common, dictionary meaning of the word "deliberate," the legislative history of the ERA's employee protection provision, and the fact that requiring an element of willfulness furthers the remedial nature of the ERA's whistleblower provision.<sup>15</sup>

Since the statute does not define the term, "deliberately," we will turn to the legislative history. The Acting Assistant Secretary finds support for defining the term to include the element of willfulness in the Senate Report:

in order to avoid abuse of the protection afforded under the [ERA's employee protection provision], the committee has added a provision which would deny its applicability to any employee who, without direction from his employer, *deliberately violates or willfully contributes* to a violation of any standard, requirement, or regulation under the act. (Emphasis added).

S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978), reprinted in 1978 U.S.C.C.A.N. 7303, 7304. We find that the use of the term "willfully contributes to a violation" in the Senate Committee's report indicates that Congress intended the words "deliberately causes" to have an element of willfulness.

As a remedial statute, the ERA should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived nuclear safety violations without fear of retaliation. *See generally, English v. General Elec. Co.*, 496 U.S. 72 (1990). *See also, Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."). Since the ERA's remedial protection is to be interpreted broadly, any affirmative defenses logically should be interpreted narrowly so as to provide the act's protections to employees who work within the bounds of safety.

The ALJ's interpretation of Section 211(g) to include any action that is not inadvertent would, however, greatly expand the breadth of this affirmative defense. Such an interpretation could lead to unfortunate results in situations in which an employee acts deliberately

(that is, not inadvertently), but innocently and without knowledge or reckless disregard that his or her action will cause a violation of the ERA or the Atomic Energy Act.

We are unaware of any decision in which a court has directly addressed the meaning of phrase, "deliberately causes a violation," in Section 211(g) or analogous whistleblower provisions. The sole Supreme Court case concerning Section 211(g) does not shed light on its meaning. In *English*, 496 U.S. at 90, the Court held that a state law "claim for intentional infliction of emotional distress does not fall within the pre-empted field of nuclear safety" or "conflict with any particular aspect of Section [211]." <sup>16</sup> The Court's cursory discussion of Section 211(g) merely repeated the ALJ's finding on the subject, which neither the Secretary nor the lower courts discussed: "In the instant case, the ALJ found that petitioner had not deliberately committed a safety violation within the meaning of Section [211(g)], . . . and neither the Secretary nor the lower courts have suggested otherwise." *Id.* at 88.

Both Complainants, Comp. Br. at 18-19, and FPC, Resp. Br. at 19-20, draw support for their interpretation of "deliberately causes a violation" from *Iowa Electric Light & Power Co. v. Local 204, Int'l Brotherhood of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987). There, the United States Court of Appeals for the Eighth Circuit affirmed a District Court ruling that overturned a labor arbitration award of reinstatement of an employee who had been discharged for "deliberately violating important federally-mandated safety regulations." *Id.* at 1425. The NRC had approved the discharge. *Id.* at 1426. The Eighth Circuit found that the employee "deliberately proceeded to defeat the interlock system, thereby committing a knowing violation of the safety rule. . . ." *Id.* at 1430. Although the court was not construing the meaning of Section 211(g), we note that the Eighth Circuit equated the term "deliberately" with the element of knowledge. The court found that where the employee knows there is a rule, knows that the rule has an important purpose, and the employee violates the rule, the employee has acted deliberately. *Id.* We do not read *Iowa Electric* to mean that an employee must know the particular rule he is violating or secondly, that an employee who recklessly disregards safety rules is protected. In *Iowa Electric* the employee had actual knowledge of causing a safety violation and the issue of reckless disregard did not arise. *Id.* at 1429-1430. We do, however, rely on *Iowa Electric* to support our conclusion that an element of willfulness must be present in order to successfully raise a 211(g) defense.

Including the element of willfulness in the meaning of "deliberately causes a violation" also is in keeping with Board precedent. In the previously discussed decision in *Dotson* where the affirmative defense was successfully raised, the complainant, Dotson, admitted "that he actively participated in reading off at least some of the answers" from a copy of the test that was left in the room where the EPA examination was administered. *Dotson*, ALJ Rec. Dec. and Ord., slip op. at 18. The ALJ found Dotson's "admission sufficient to determine that Complainant deliberately participated in an activity which violated the Act, whose provisions mandate the taking and passing of the CFC examination,

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presumably without cheating, in order to be allowed to continue working in the HVAC industry." *Id.* The discussion in *Dotson* shows that the complainant acted willfully, with

either knowledge or reckless disregard, that his cheating would cause a violation of the Clean Air Act as he continued to work in refrigeration without having lawfully passed the certification exam. Slip op. at 18-19.

### **Section 211(g) Does Not Require Specific Intent**

Complainants suggest that decisions of the Secretary construing Section 211(g) require a finding of the complainant's "specific intent" to cause a violation. Comp. Br. at 14. As an example, Complainants point to language in *Drew v. Jersey Central Power & Light Co.*, Case No. 81-ERA-3, ALJ (Rec.) Dec. and Ord., June 16, 1982, slip op. at 19, *adopted in* Sec. Final Dec. and Ord., Jan. 13, 1984: "There is no substantial evidence that Complainant deliberately caused any violation of the law. Drew did proceed to repair the defective weld valve in November 1978 without benefit of a prior written approval of his welding procedure for that weld, but he believed he was acting properly."

We do not find a specific intent requirement in *Drew*, where the ALJ emphasized that the failure to obtain prior written approval was merely a "technical procedural problem" and a "technical violation" of quality assurance rules. *Drew*, ALJ Dec., slip op. at 18. There was no indication of reckless behavior on Drew's part. At most, *Drew* stands for the proposition that where a technical and procedural regulatory violation is posited as the basis for a Section 211(g) defense, the complainant's belief that he was not causing a violation is a factor to consider.

Nor do other, later decisions of the Secretary, convince us that for a successful Section 211(g) defense there must be a showing of the complainant's specific intent to cause a violation. In *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, whatever the complainant's intentions in using sloppy practices to conduct laboratory tests, there was no showing that his poor practices caused any statutory or regulatory violation, and therefore the defense based upon "deliberately causes a violation" necessarily failed.<sup>17</sup>

Similarly, in *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, although the record established that violations of NRC regulations had occurred, the Deputy Secretary found that the complainant did not *cause* the violations: "Since I credit Creekmore's testimony that he neither knew about, or condoned, the premature issuance of good guy letters [clearing personnel for access to nuclear sites], I also agree with the ALJ's finding that Creekmore did not deliberately cause [the respondent] to violate the ERA." *Creekmore*, slip op. at 15.

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Relying upon the legislative history and statutory purpose of the whistleblower provision and consistent with earlier decisions of the Secretary and this Board, we find that to establish a valid Section 211(g) defense, a respondent must show that a

complainant willfully or recklessly caused a violation of the ERA or the Atomic Energy Act, that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation. Having defined the necessary showing for "deliberately causes a violation," we will discuss whether FPC made that showing in this case.

**Complainants Acted With Reckless Disregard, and Therefore  
Deliberately Caused a Violation**

Complainants did not have actual knowledge that maximizing the MUT's hydrogen pressure and draining its water would cause a violation of the ERA or the Atomic Energy Act, as FPC's actions demonstrate. The company presented Curve 8 to the reactor operators as a conservative operating curve and there is no violation if such a curve is exceeded by a small amount. In addition, the annunciator light indicating that MUT hydrogen pressure was too high had been triggered often in the months prior to September 1994. Complainants suspected, but did not actually know, that Curve 8 was nonconservative. Indeed, it was only after the Complainants conducted the unauthorized evolutions that FPC managers learned definitively that Curve 8 was a design curve that should never be exceeded.

We would be more inclined to find an absence of recklessness if there were no other means to seek correction of Curve 8. As we noted above, however, Complainants could have brought their concerns to higher managers within FPC and to other levels of the NRC, both in the regional office and at the headquarters. An NRC resident inspector even invited Complainants to submit a formal allegation to the NRC concerning Curve 8.

Complainants contend that their actions "were appropriate, and consistent with the type encouraged by the respondent." Comp. Br. at 8. Nevertheless, they admitted in depositions that the specific evolutions they conducted had not been done in the past. And if they sincerely believed their actions were consistent with procedures that FPC encouraged, they could easily have sought approval for the evolutions from higher management. They did not do so. *See* R. D. and O. at 16.

Complainants were well aware of the danger of operating the reactor with hydrogen pressure that was too high for the level of water in the MUT. Both Fields (Dep. p. 54, 78) and Weiss (Dep. p. 65-66) believed that catastrophe could arise if a loss of coolant accident occurred while the MUT's hydrogen pressure was too high.

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While the NRC acknowledged that the Complainants' actions had the salutary effect of proving that Curve 8 was nonconservative, the agency also concluded that the salutary effect did not excuse the Complainants' risk taking:

We further recognize that your operating crew contributed to the determination that the curve for maximum make-up tank pressure was in error and nonconservative and that the plant had been periodically operated outside its design basis. You also provided additional data that assisted in determining the extent to which operators were violating OP-103B, Curve 8, and the environment that existed at FPC. Nevertheless, we emphasize that the ends cannot justify the means. In this case, your actions demonstrated the validity of your concerns; in other instances such might not be the case.

RX 61 at 2 (Fields, Weiss letters); *see also* RX 62 at 2 (Stewart letter).

Nuclear power is "one of the most dangerous technologies man has invented." *Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, concurring). We find that, in light of the inherent danger involved in operating a nuclear plant and the existence of other avenues of redress for their suspicions about Curve 8, Complainants acted with reckless disregard of whether a violation of the ERA or the Atomic Energy Act would occur when they conducted the September 4 and 5 evolutions.

### **CONCLUSION**

In light of the Complainants' reckless disregard for whether a violation would occur, the Complainants "deliberately caused a violation" of regulations promulgated under the Atomic Energy Act and the ERA. There is no genuine issue of material fact and FPC has established a valid Subsection 211(g) defense as a matter of law. Accordingly, we accept the ALJ's recommendation and grant summary decision to FPC. The complaints are **DISMISSED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

### **[ENDNOTES]**

<sup>1</sup> Section 211(a), 42 U.S.C. §5851(a), provides in relevant part:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

\* \* \*

<sup>2</sup> We will refer to Fields, Weiss, and Stewart collectively as "Complainants."

<sup>3</sup> Section 211(g) provides in relevant part:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter [the ERA] or of the Atomic Energy Act of 1954. . . .

42 U.S.C. §5851(g). Section 211(g) provides an affirmative defense on which the respondent bears the burden of proof. *See James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, slip op. at 6 (stating that the respondent did not show by a preponderance of evidence that the complainant deliberately caused a violation).

<sup>4</sup> Since the recommendation to dismiss this case was made on summary grounds and determination of disputed factual issues is not necessary to render this decision, we do not make any factual findings.

<sup>5</sup> Reference is to the complaint filed by Fields. Weiss and Stewart filed shorter complaints that incorporated Fields' lengthier complaint and attachments.

<sup>6</sup> "CX" refers to Complainants' exhibits attached to the Complaint and to their opposition to the motion for summary decision; "RX" refers to Respondent's exhibits attached to its motion.

<sup>7</sup> CR-3 Annunciator Response procedure AR-403 requires operators to reduce pressure to within acceptable limits upon receipt of an alarm. CX 10.

<sup>8</sup> Prior to the meetings with NRC-OI staff, Fields told Weiss that he would not mention the September 4 evolution unless NRC-OI investigators asked him about it. Fields Dep. at 260; Weiss Dep. at 263. Complainants attribute this reticence to the advice of FPC counsel not to volunteer information to the NRC. C. at 47; Weiss Dep. at 263.

<sup>9</sup> The NRC determined that the Complainants' "conduct of unauthorized tests of MUT over pressure without preparation of the required written safety evaluations" violated 10 C.F.R. §50.59. C. Ex. 58, Enclosure 1 at 2. The NRC promulgated the regulations at 10 C.F.R. Part 50 pursuant to the Atomic Energy Act and the ERA. 10 C.F.R. §50.1. Therefore, we deem a violation of these regulations to constitute a violation of the Atomic Energy Act and the ERA.

<sup>10</sup> The Clean Air Act's nearly identical defense states:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

42 U.S.C. §7622(g).

<sup>11</sup> There is nearly identical language in the NRC's letters to Weiss, RX 61, and Stewart, RX 62.

<sup>12</sup> We adopt the ALJ's rejection of the argument that Weiss and Stewart acted with direction of their employer because they were following the direction of Fields, their superior. R. D. and O. at 16-18.

<sup>13</sup> Complainants refer to only a portion of the NRC's definition, however. The definition also includes "an intentional act or omission that the person knows . . . (2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor." 10 C.F.R. §50.5(c). On two occasions when Complainants intentionally forced the MUT hydrogen pressure to the point that it triggered the annunciator alarm and allowed the alarm to remain on for some 35 to 43 minutes, they engaged in an intentional act that violated FPC's procedures and instructions. Thus, if we were to adopt the NRC's definition, as Complainants suggest, we would find that they engaged in deliberate misconduct as defined by the NRC regulation.

<sup>14</sup> The ALJ stated that he derived the three part test from the Secretary's analysis in *Jackson and Roskam v. Ketchikan Pulp Co*, Case Nos. 93-WPC-007 and 93-WPC-008, Sec. Final Dec. and Ord., Mar. 4, 1996. *See* R. D. and O. at 15-16. In *Jackson and Roskam* the Secretary made no analysis of the analogous "deliberately causes a violation" language in the Federal Water Pollution Control Act (WPCA). The Secretary's entire discussion of the issue was contained in one sentence: "For purposes of my review of the ALJ's decision on the merits, I have assumed, without deciding, that Jackson's attempt to dispose of a cable into the water did not exclude him from protection under the WPCA. 33 U.S.C. §1367(d)." *Jackson and Roskam*, slip op. 5 n.3.

<sup>15</sup> The Acting Assistant Secretary "offered no opinion as to whether the complainants here willfully violated a nuclear safety requirement." Asst. Sec. Br. at 4 n.4.

<sup>16</sup> After the *English* decision, Congress amended the ERA in the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-86, 106 Stat. 2776. The amendment renumbered former §210 as §211.

<sup>17</sup> *James* arose under the WPCA, which contains a provision nearly identical to Section 211(g). *See* 33 U.S.C. §3367(d).